United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

76-1357

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1357

NO BINDING COPY

UNITED STATES OF AMERICA

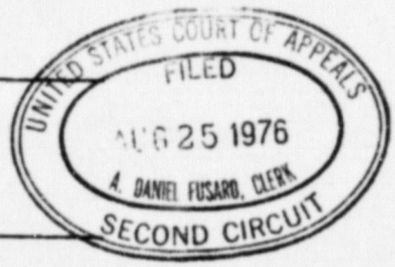
Appellant,

-against-

SIDNEY E. SALZMANN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR THE APPELLEE
AND SUPPLEMENTAL APPENDIX

LOUIS LUSKY
435 West 116th Street
New York, N.Y. 10027

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BRIEF FOR THE APPELLEE

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Government's so-called Statement of Facts, loaded with argument and laced with sarcastic ad hominem attacks on the trial judge, provides little help to understanding of the essential issues on this appeal. We therefore offer a concise statement of the controlling facts and procedural history.

The defendant was indicted on June 26, 1972. The two counts of the indictment charged him with failure to comply with an order to report for physical examination and an order to report for induction, in alleged violation of the Selective Service Law and regulations. (A. 114-15) At all times since December, 1969, defendant had resided in Israel and had kept the Government informed of his address there. He had repeatedly informed the Government (by letters to his draft board received December 22, 1970, January 14, 1971, and February 24, 1971 (A. 177, 180, 183)) that he was financially unable to pay for travel to the places designated for physical examination (Livorno, Italy)

and induction (Fort Hamilton, New York).

On June 14, 1971, more than a year before the indictment, the Selective Service regulations had been amended to provide that an overseas registrant could travel at Government expense to the induction point from the United States air base closest to his place of residence. (Local Board Memorandum No. 73, as amended June 14, 1971) The United States Attorney, though he had received the defendant's latest letter, which the draft board had forwarded to him on February 25, 1971 (A. 182), did not inform the defendant that free travel had become available -- or, indeed, reply to the said letter in any way.

On September 25, 1972, after the indictment, the defendant wrote once again to reiterate his claim of financial inability, directing this letter to the United States Attorney. (A. 121-23) The United States Attorney still did not inform him that free travel was available, though it was the Government's policy to dismiss indictments of this kind if the defendant submitted to induction.

On December 10, 1972, the defendant attained the age of 26. (A. 175)

On December 26, 1972, the six-month period within which the Government was required by applicable court rules to be ready for trial unless the period had been extended by exceptions provided in those rules, expired.

At no time did the Government make any effort to procure the defendant's return to this country for trial.

These are the controlling facts. We now summarize the procedural history, some of which the Government's brief does not mention.

On September 10, 1974, the trial court appointed the undersigned as attorney for the defendant, and directed the United States Attorney to inform the defendant of the appointment by letter, which he did. Thereafter the

defendant sent the undersigned a written authorization empowering him to represent the defendant in the present case; and, upon the filing of that authorization, the Government provided the undersigned with a copy of the defendant's Selective Service file. On July 31, 1975, the undersigned moved to dismiss this indictment on speedy trial and other grounds, designating September 19, 1975, as the date for hearing. The motion was argued that day, and the trial court reserved decision. The trial court invited the filing of additional briefs, and the parties complied. On January 6, 1976, the trial court invited still further briefs, on the speedy trial question.

Perceiving that the Government might seek to excuse its failure to be ready for trial within six months from indictment, on the basis of "exceptional circumstances" (one of the excuses recognized by the applicable court rules), the defendant on March 20, 1976, served on the United States Attorney, as Attorney for the United States Government, a request for discovery and inspection as authorized by Rule 16(a)(1)(c) of the Federal Rules of Criminal Procudure. The request called for documents relevant to the question whether the Government, as a matter of policy and practice, endeavors to procure the return of other indicted defendants to this country whether or not extradition is available, but makes no such effort with respect to Selective Service defendants. By letter dated April 5, 1976, the United States Attorney rejected the request, saying only:

> In light of all the circumstances of the above matter and the limitations imposed by Rule 16(a)(2) and 16(a)(1)(c) of the Rules of Criminal Procedure cooperation with your request for discovery of March 20, 1976 does not appear to be warranted. (Supplemental Appendix (hereafter "S.A.") 7)

The defendant thereupon moved for compliance. (S.A. 1-13) After argument on May 6, 1976, the Court entered an order on May 19 (S.A. 14-17) directing the Government to (1) produce all documents within the control of the United

States relating to efforts to bring Selective Service defendants back to this country for arraignment and/or trial; and (2) inform the court and defendant's attorney of efforts to procure the return of any indicted defendants to this country without resort to extradition treaties since March 3, 1970 (the date of the offense alleged in the second count of the indictment).

Paragraph 3 of the order provided further:

> 3. The parties are advised that, unless the attorney for the Government shows cause to the contrary on or before June 10, 1976, the Court will judicially notice the following facts:
>
> (a) that neither the United States nor the State of Israel characterizes violations of military conscription laws as political crimes; and
>
> (b) that the United States follows the policy and practice of endeavoring to procure the return to this country of some indicted defendants without regard to extradition treaties, but does not endeavor to procure the return to this country of defendants indicted for violation of the Selective Service laws or regulations thereunder.

Paragraph 4 of the order relieved the Government of obligation to produce internal government documents relating to the investigation or prosecution of the case, or statements made by government witnesses.

The Government refused to comply with the order. In a letter dated June 10, 1976, to the trial judge, it took the position "that where, as here, the defendant was aware of the pending indictment, his decision to avoid trial constitutes a waiver of his right to a speedy trial" and that the defendant "is in no position to assert an alleged violation of the Speedy Trial Rules." (S.A. 18-20) The letter did, however, volunteer information not called for by the discovery order, namely, a statement of Government policy with respect to extradition. This information consisted of the affidavit of a State Department employee. (A. 117-19) Even this affidavit was limited to Govern-

ment practice and policy with respect to Israel; it did not describe the extradition practice with respect to other countries, though the May 19 order was not limited to Israel.

The United States Attorney's said letter also objected, belatedly, to the form of Paragraph 2 of the May 19 order, on the ground that it called for information rather than documents. No mention was made of the fact that the defendant's request and motion had called for documents only; that the trial court, at the hearing on May 6, 1976, had limited Paragraph 2 of its order to the production of information rather than documents in order to simplify the task of compliance; that the Government had made no objection to the proposed form of the order at that hearing; and that the Government did not avail itself of the opportunity to tender a formal order for entry, as both parties were invited to do but only the defendant did. (A. 165-66, 172-73)

The Government having made no contrary showing, the trial court took judicial notice of the facts specified in Paragraph 3 of the May 19 order. (A. 54-55) This was done in the course of a memorandum and order dated July 16, 1976, granting the motion to dismiss the indictment on speedy trial grounds.

ARGUMENT

I. SINCE THE GOVERNMENT WAS NOT READY FOR TRIAL WITHIN SIX MONTHS FROM THE DATE OF THE INDICTMENT, THE INDICTMENT WAS RIGHTLY DISMISSED UNLESS THE GOVERNMENT HAS SUSTAINED ITS BURDEN OF SHOWING THAT THE DEFENDANT WAS "ABSENT" OR "UNAVAILABLE," AS THOSE TERMS ARE DEFINED BY THE RULES, OR THAT "EXCEPTIONAL CIRCUMSTANCES" EXISTED.

Four successive sets of court rules relating to speedy trial have been in effect since June 26, 1972, the date of the indictment: The

Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (effective July 5, 1971); the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases (effective April 1, 1973); the Interim Plan of the United States District Court for the Eastern District of New York (effective September 29, 1975); and the Transitional Plan (effective July 1, 1976). The trial court's opinion contains a full review of these four sets of speedy trial rules (A. 13-26), and there is no need to repeat it here.

We are not certain whether the present motion to dismiss is governed by the Second Circuit Rules, which were in effect throughout the six-month period immediately following the indictment, or by the Eastern District Plan, which was in effect on July 31, 1975, when the present motion to dismiss was made. Since, as will appear below, the two sets of rules are identical in all respects presently material, we shall refer to both of them. There would seem to be no reason to burden this brief with discussion of the Interim and Transitional Plans which have been adopted more recently, pursuant to the Speedy Trial Act of 1974 (8 U.S.C. §§ 3164-66) inasmuch as this Court has held in United States v. Furey, 500 F.2d 338 (2d Cir. 1974), 514 F.2d 1098, 1101 (2d Cir. 1975) that the Act is not retroactive:

> Since the events giving rise to the present appeal all occurred prior to the enactment of the Speedy Trial Act of 1974, P.L. No. 93-619 (January 3, 1975), U.S. Code Congressional and Administrative News, p. 2407, which is not retroactive, the Plan governs the instant proceeding, cf. 1 U.S.C. § 109; United States v. Fiotto, 454 F.2d 252 (2d Cir.), cert. denied, 406 U.S. 918, 92 S.Ct. 1769, 32 L.Ed.2d 117 (1972). We need not consider the effect of the Speedy Trial Act on the continued applicability of the present Plan.

In the Furey case, the prosecution began with the arrest of the defendant on December 19, 1972, and the motion to dismiss was filed on December 21, 1973.

Both the Second Circuit Rules and the Eastern District Plan place an affirmative duty on the Government to be ready for trial within six months

from the date of the indictment (Rule 4), unless the six-month period has been enlarged for one or more of the reasons specified in Rule 5. Each set of rules excludes from the six-month period "[t]he period of delay resulting from the absence or unavailability of the defendant" (Rule 5(d)) and other periods of delay "occasioned by exceptional circumstances" (Rule 5(h)).

This Court has provided two general guidelines for applying the speedy trial rules. First, the rules are predicated on considerations of sound judicial administration and public confidence, and provide standards for the Government which are not dependent upon the presence or absence of prejudice to the particular defendant. As was said with respect to the Second Circuit Rules in Hilbert v. Dooling, 476 F.2d 355, 357-58 (2d Cir. 1973):

> In summary, the Rules are designed to require the government to be ready to try cases promptly, subject to certain types of delay, generally recognized as arising from legitimate or unavoidable causes. The purpose of Rule 4 is to insure that regardless of whether a defendant has been prejudiced in a given case or his constitutional rights have been infringed, the trial of the charge against him will go forward promptly instead of being frustrated by creeping, paralytic procedural delays of the type that have spawned a backlog of thousands of cases, with the public losing confidence in the courts and gaining the impression that federal criminal laws cannot be enforced.

Second, "the burden of proof is on the Government to establish those times to be excluded from the six-month period." United States v. Flores, 501 F.2d 1356, 1360 n. 4 (2d Cir. 1974).

The rules make it perfectly clear that the Government must either be ready for trial within the six-month period or bring itself within one or more of the exceptions specifically provided. On various theories, however, the Government has endeavored to import into the rules an additional, general exception for cases in which the defendant has not been brought before the court. As noted above, it claims that the defendant lacks standing, saying that "a fugitive, like the defendant, is in no position to assert an alleged

violation of the speedy trial rules." (S.A. 18) That claim flies in the face of this Court's ruling in United States v. Weinstein, 511 F.2d 622, 629 (2d Cir. 1975) which is the law of the case since the Salzmann prosecution was one of the 26 there involved:

> We should make it clear that we do not intend to preclude Judge Weinstein from entertaining motions on behalf of fugitive defendants who have agreed that Professor Lusky or any other attorney represent them.

The Government unsuccessfully sought modification of the opinion in this respect. Its motion, dated February 11, 1975, stated (p. 1):

> We wish to state at the outset that we have no objection to Judge Weinstein, or any other district court judge, entertaining motions on behalf of fugitive defendants in Selective Service cases who are represented by defense counsel authorized to act on their behalf; and, indeed, we have so advised Judge Weinstein."

The motion urged that the quoted language in the opinion be narrowed so as to apply to Selective Service cases only, saying (Motion, pp. 1-2) that an exception to "controlling precedent"

> is justified at this time with respect to fugitive Selective Service defendants because of what the United States District Court for the District of Oregon described * * * as "the present national interest in resolving the problems arising from the significant numbers of your [sic. young] American citizens who stand charged with these violations.

The motion was denied on February 27, 1975.

Second, the Government claims that "where, as here, the defendant was aware of the pending indictment, his decision to avoid trial constitutes a waiver of his right to a speedy trial." (A. 18) This claim flies in the face of the waiver provisions of the speedy trial rules themselves, which state quite precisely what shall constitute a waiver. Rule 8 of the Second Circuit Rules, and Rule 7 of the Eastern District Plan, both provide:

> A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. How-

> ever, failure of a defendant to move for discharge prior to plea of guilty or trial shall constitute waiver of such rights. The preceding sentence shall not apply to a defendant without counsel unless he has notice of these rules.

Third, the Government claims that it has complied with the rules, saying (Brief, p. 18):

> The United States here was ready for trial from the date of the indictment.

This is a remarkable assertion. It implies that the Government can avoid the force of the speedy trial rules simply by declaring itself ready for trial even though it is not -- a trial being impossible because the Government has failed to bring the defendant before the court. The Government stated its position more carefully to the trial court (A. 128):

> MR. KORMAN: We are ready to prosecute them as soon as Mr. Lusky will present his clients. (Emphasis added)

But this is readiness for trial only if the Government can passively await the defendant's appearance, being privileged to do nothing to bring the case to trial unless and until the defendant voluntarily appears. The Supreme Court rejected that notion in Barker v. Wingo, 407 U.S. 514, 527 (1972):

> A defendant has no duty to bring himself to trial; the State has that duty * * * (footnote omitted)

See also United States v. Yagid, 528 F.2d 962, 966 (2d Cir. 1976):

> The purpose of all the Plans for Achieving Prompt Disposition of Criminal Cases has been to serve the public interest in the prompt adjudication of criminal cases, and not "primarily to safeguard defendants' rights." United States v. Flores, 501 F.2d 1356, 1360 n. 4 (2 Cir. 1974).

And see United States v. Rodriguez, 497 F.2d 172, 175 (5th Cir. 1974):

> The uniqueness of these plans [adopted by the District Courts pursuant to Rule 50(b)] is that they place an affirmative duty on the government to bring the accused to trial. In judging plan compliance, consideration of lack of prejudice to the defendant or demand for trial by the defendant could serve to transpose a part of this

> burden to the accused. It is the duty of the prosecutor and the court to make these plans work.

The Government inveighs against insistence upon a notice of readiness in this case. (Brief, pp. 18-20) We believe, however, that it has misconceived the trial court's ruling. The trial court referred to the lack of a notice of readiness not as an independent basis of dismissal but for the sole purpose of deciding whether the Government was in a position to claim compliance with the six-month rule, in which event there would have been no need to inquire whether any of the exceptions to that rule applied. (A. 30) Since the Government was not in fact ready for trial by December 26, 1972, when the six-month period expired, the trial court rightly decided that the indictment should be dismissed unless one or more of the exceptions could rightly be invoked. To that question we now turn.

II. THE DEFENDANT HAS NEVER BEEN "ABSENT" OR "UNAVAILABLE" AS THOSE TERMS ARE DEFINED BY THE RULES.

If the speedy trial rules used the term "absent" as simply meaning "not present," we would have a different case; but they do not. They provide a precise and special definition for the term. Second Circuit Rule 5(d) provides:

> A defendant should be considered absent whenever his location is unknown and in addition he is attempting to avoid apprehension or prosecution or his location cannot be determined by due diligence.

Rule 5(d) of the Eastern District Plan provides:

> A defendant should be considered absent whenever his location is unknown.

Since the Government has known the defendant's location at all times since he went to Israel in 1969, he has not been "absent" within the meaning of the

speedy trial rules.

The question remains whether the defendant has been "unavailable." This term also has been given a precise and special definition by the speedy trial rules. Rule 5(d) of the Second Circuit Rules and Rule 5(d) of the Eastern District Plan both provide:

> A defendant should be considered unavailable whenever his location is known but his presence for trial cannot by obtained by due diligence.

The issue thus narrows down to the question whether the Government has sustained its burden of showing that it exercised "due diligence" to obtain the defendant's presence for trial.

The Government makes no claim that it has done anything at all to bring the defendant back from Israel. Instead, it claims that in this case zero diligence is "due diligence" because any effort it might have made would have been futile. In order to substantiate this claim, it must establish both of the following propositions: (1) That the defendant would not have returned voluntarily if the Government had advised him that free travel had become available; and (2) that Israel would have rejected any suggestion by the Government that the defendant's return be effected by means other than extradition. We examine these two propositions separately.

In claiming that its failure to advise the defendant of the availability of free travel was consistent with "due diligence," the Government invites this Court to make a factual finding as to whether the defendant in fact was wealthy enough to pay for a trip to the United States. It points to his financial affidavit (made several years after the ordered induction date, at his unpaid attorney's request, for submission under the Criminal Justice Act) and contends that because it lists assets consisting of an apartment, an automobile, and an interest in a mutual fund (and also substantial indebtedness)

the defendant could have afforded a trip to the United States in January, 1971. Against this, there are the defendant's repeated statements of his financial inability, referred to above.

There is no need to resolve this conflict, however, since the question is not defendant's financial condition but the Government's lack of diligence. We made this quite clear to the trial court on the argument of the motion; defendant's attorney, in a statement that the Government quotes with misleading effect (Brief, p. 2) said (A. 130-32):

> * * * I do not know one way or the other whether Mr. Salzmann really lacked the money to get to Brooklyn for induction. I know what he says. But Mr. Maher [Assistant United States Attorney] is quite right in saying it is a self-serving declaration. He [the defendant] refers to the fact [that] if you spend money outside the country for travel you have to pay for it in foreign currency, in U.S. currency, or else there is an exhorbitant tax laid by Israel if you use Israel money for such purposes. I haven't checked that. It may or may not be an accurate statement. But in any case the truth or falsity of these facts is not in issue. The significance of them is of the case as it was represented to be by the applicant, by the registrant who was a person who was not unwilling to be inducted but lacked the money to do it. * * *
>
> * * * if the Government is looking at these people as being prima facie unreliable and prima facie evaders, and is just unwilling to look at them one by one and take account of letters of the kind from which I read excerpts, why then, I suppose they could say, "Well, let him find out about the regulations for himself." * * * our basic contention is that the Government, including the U.S. Attorney's Office, is obligated to deal with these cases as individual matters. They involve possible felonies, that is, which will plague a man for his life. And that under these circumstances, knowing that the money problem was what he said, the least that they could have done, it seems to me, was to tell him that there was now a way for him to get home. I do not know where the nearest U.S. air base was to his home, maybe out in Turkey some place. But this is a material change in the regulations. Material on the facts as they had been represented to the Government by this registrant.

> * * * The question is whether the Government was on notice of facts and of changes in the law which the Government like everybody else is presumed to know probably and does know actually, at least the Department of Justice does, when there are changes in the regulations in the Government criminal cases that are pending. That enough had come to their knowledge so that ordinary consideration to an individual should have allowed [sic. led] them to tell him about this difference, I think, this new regulation. And if he hadn't come home then, well, why, all right. But nobody knows whether he would have or not.

The standard of diligence to which the Government is held in such situations has been adjudicated in various contexts, and the courts have held that the Government does have an affirmative obligation to help the private citizen avail himself of benefits afforded to him by regulations of which he is ignorant, at least when this can be done with little trouble or expense to the Government. Five of the recent decisions to this effect are cited and described in the trial court's opinion (A. 41-42): Chernekoff v. United States, 219 F.2d 721, 723 (9th Cir. 1955); United States v. Dix, 4 Sel. Serv. L. Rep. 3051 (S.D.Ohio 1971); United States v. Turner, 421 F.2d 1251, 1255 (3d Cir. 1970); United States v. Moyer, 307 F. Supp. 613, 615 (S.D.N.Y. 1969); United States v. Sobczak, 264 F. Supp. 752 (N.D. Cal. 1966). The same principle was applied in Corniel-Rodriguez v. I.N.S., 532 F.2d 301 (2d Cir. 1976) and Piccirillo v. I.N.S., 512 F.2d 1289, 1291 (9th Cir. 1975).

Just as the Government has been held obligated to respond to a claim of conscientious objection by providing the draft registrant with a proper official form for use in making his claim, even though he has not specifically requested it (United States v. Turner, supra; United States v. Moyer, supra), so, we submit, the Government should have responded to this defendant's claim of financial inability to travel by informing him of the travel regulation. Its failure to do so was a lack of "due diligence" to procure the return of

the defendant to the United States. And if he had returned, for induction, his indictment would presumably have been dismissed in accordance with the Government's then policy. (A. 67-70; Appellant's Brief, pp. 16, 28)

Even if the defendant had made no claim of financial inability, there would still be ample basis for the trial court's decision that the Government has failed to demonstrate "due diligence." At all times it has known the defendant's whereabouts. The draft board received from him notice of his address in Jerusalem on December 16, 1969, even before the theological school at which he had been studying informed the draft board that he was no longer in attendance there. (Item 25(c) of Record on Appeal, not entirely included in Appendix.) Israel is a friendly nation. Yet the Government did not even inform the Israeli authorities that the defendant was wanted for trial in Brooklyn on a felony charge, much less request his deportation. The Government seeks to excuse this omission on the ground that it would have been futile to request the cooperation of Israel; but its attempted showing of futility falls far short.

The Government rests its claim of futility on two propositions: (1) That the extradition treaty between Israel and the United States does not cover Selective Service offenses. (2) That Israeli law forbids compliance with a request not based on the extradition treaty. The first of these propositions is correct, but irrelevant. The second proposition is not established.

It is common knowledge that extradition is not the only way to procure the return of an indicted defendant to this country. The Government has for a long time resorted to a number of methods other than extradition to procure the return from other countries of persons accused or convicted of crime. Those methods are described by Professor Alona E. Evans in "Acquis-

ition of Custody over the International Fugitive Offender -- Alternatives to Extradition: A Survey of United States Practice" (1965), published at page 77 of the 1964 British Yearbook of International Law (issued 1966). After careful examination of the cases, Professor Evans summarized United States practice as follows (p. 103; footnotes omitted):

> Judging by available sources, the United States has resorted to, or acquiesced in other States' requests for, disguised extradition frequently enough during the past five decades to suggest that operating officials find in such quasi-formal methods as exclusion, expulsion, or special arrangements, practical alternatives to extradition. These 'alternatives' supplement, but do not supplant, nor are they intended to supplant, the formal process of extradition. Founded upon bilateral agreements 'tailored' to the particular conditions of law and legal procedure obtaining within each signatory State, not to speak of the diplomatic relations obtaining between them, extradition cannot meet all contingencies arising out of a fugitive's taking asylum abroad. The choice between seeing an accused person go free from answering the charges against him or an escaped convict remaining at large and resorting to some form of disguised extradition can be readily rationalized in the circumstances. But even in the period 1910-1933 when exclusion, expulsion or special arrangements were utilized on behalf of the United States or by the United States at the request of other States often enough to approach to a policy, the point was made time and again that such measures of rendition were 'not usual'. That such 'exceptional' measures continue to be used today is partly the fault of the extradition process itself which, like any other legal proceeding, tends to be cumbersome, for speed is not its raison d'être; and partly the fault of operating officials whose zeal gets the better of their judgment, or who are attracted by the ease of informal methods especially in conditions prevailing in border States.

It is well known that the Government has not allowed the unavailability of extradition to deter it from procuring the return of indicted or convicted defendants from other countries, including Israel. In 1962, for example, the year before the extradition treaty between the United States and Israel became effective, Robert Soblen's conviction for espionage became final (370 U.S. 944) and he fled to Israel. At the request of the United States, Israel deported him on a chartered plane where a United States marshal took custody

of him, transferring with him in Athens to a New York-bound plane. He attempted suicide, was hospitalized in London, vainly sought legal relief there, and killed himself when it was denied. Articles discussing the case include O'Higgins, "Disguised Extradition: The Soblen Case," 27 Modern L. Rev. 521 (1964); Evans, "Reflections Upon the Political Offense in International Law," 57 Am. J. Int'l L. 1, 9-11 (1963); Thornberry, "Dr. Soblen and the Alien Law of the United Kingdom," 12 Int'l & Comp. L. Q. 414 (1963); Tate, "Draft Evasion and the Problem of Extradition," 32 Albany L. Rev. 337, 352-53 (1968).

The case of Meir Lansky is almost equally well known. Having gone from the United States to Israel in 1970, he applied for permanent residence the following year. On March 4, 1971, he was served in Tel Aviv with a subpoena issued by a Miami grand jury investigating income tax violations. On March 24 the grand jury indicted him for failure to appear. In 1972 Israel ordered him deported as "a person with a criminal past, likely to endanger public welfare." His record of convictions consisted of five misdemeanors -- two for gambling, two for disorderly conduct (in 1918-1920) and one "during the Prohibition era." (He was suspected, however, of participation in organized crime.) The extradition treaty did not cover these offenses, but the net result was to return him to Miami for trial. His conviction was reversed on appeal. United States v. Lansky, 496 F.2d 1063 (C.A.5, 1974).

The foregoing facts are taken from the Court of Appeals opinion and from Klein, "The Lansky Case," 8 Israel L. Rev. 286 (1973). Those sources do not reveal what part, if any, our Government played in bringing about Lansky's deportation. It seems likely, however, that it did play a part. Newsweek (Nov. 29, 1971, p. 33) quoted Dougald McMillan of the U. S. Department of Justice as saying to an Israeli newsman:

"If Meyer Lansky and his friends are allowed to remain,

> you will have an import of organized crime. * * * They will drag you into prostitution, blackmail, violence and all the troubles that crime brings."

This Court judicially knows that the Government avoids, when it can, the cumbersome and protracted proceedings involved in formal extradition, preferring to achieve its purpose by requesting or suggesting unilateral application of local law by the nation in which the wanted person is located. Earlier this year the Court referred to this practice as a "time-proven course," saying in United States v. Estremera, 531 F.2d 1103, 1108 (2d Cir. 1976):

> The uncontroverted evidence demonstrates that as of January 1974, both American liaison agent Edward McShane and Canadian immigration officials reasonably believed on the basis of experience that defendant was properly subject to deportation from Canada and that normally deportation would be the least protracted or cumbersome remedy employed in such circumstances in view of Estremera's use of an alias to gain entry into Canada, his prior American conviction, his arrest in Canada, and the pending charges against him in New York. The deportation proceedings progressed expeditiously and smoothly, as indicated by the Canadian immigration court's April 1, 1974, finding of deportability, until the Canadian Federal Court dismissed the case, roughly nine months after it was commenced, because the prior conviction was for a misdemeanor. Under the circumstances, the fact that the prosecutors, along with Canadian immigration officals and the highest Canadian immigration tribunal, proved to be mistaken in their reliance on deportation hardly established that the government acted unreasonably or without diligence in following this time-proven course, see United States v. Oliver, 523 F.2d 253 (2d Cir. 1975); cf. United States v. Cangiano, 491 F.2d 906 (2d Cir.), cert. denied, 419 U.S. 904, 95 S.Ct. 188, 42 L.Ed.2d 149 (1974).

Estremera's speedy trial claim was therefore rejected, and his bank robbery conviction affirmed.

See also United States v. Sobell, 142 F.Supp. 515, 524 (S.D.N.Y. 1956, per Kaufman, J.):

> Informal expulsion procedures are still available to the surrendering state both for enumerated and certainly for nonenumerated crimes, see IV. Hackworth, Digest of International Law, Chapter XII * * *

Deportation is not the only alternative to extradition. For example, a different procedure is described in United States v. Hay, 527 F.2d 990, 993 (10th Cir. 1975), cert. denied 96 S.Ct. 1666 (1976):

> In June 1972, the government had learned of appellant's presence in Mali, Africa * * *. Because the United States has no extradition treaty with Mali, appellant was able to remain there for nine months after his indictment. * * * Finally, the State Department was able to negotiate an informal agreement with the government of Mali to have appellant declared persona non grata. Mali revoked his visa and its police shepherded him aboard a plane. As appellant's plane was about to land in New York, he was arrested by United States marshals who were conveniently aboard.

Additional cases are cited in the trial court's opinion. (A. 50)

It is plain that a variety of alternatives to extradition are in fact employed by the Government. We do not refer to irregular procedures such as those employed in United States v. Toscanino, 500 F.2d 267, 504 F.2d 1380 (2d Cir. 1974) and United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), but to procedures that are recognized as legitimate by international law.

Believing that the litigated cases referred to above are only the tip of the iceberg, we sought to bring into the record the full picture of the Government's resort to alternatives to extradition in recent years. As noted above, we moved for discovery on this point and the trial court ordered it. The Government refused to make the required disclosure. It is therefore in no position to claim, as it does, (Brief, p. 21) that defendant must show "that there were reasonable steps that could have been taken which would have resulted in his return to the United States." The burden was on the Government, not the defendant; and, even if this were not so, the trial court was fully justified in making the usual inference that facts peculiarly within a party's knowledge, which that party has refused to disclose on lawful demand,

are adverse to its position.

The Government's final contention on this branch of the case is that the law of Israel forbids Israeli authorities to comply with a request based on international comity. Foreign law must be proved in the same way as other facts. The Government has adduced no such proof. It relies solely on the affidavit of Murray R. Stein, a State Department employee who makes no pretensions to expertness in Israeli law or, indeed, in the Government's practice with respect to alternatives to extradition. He demonstrates the extent of his non-expertness in Israeli law by saying (A. 118):

> Article 21 of the Israeli Extradition Act prohibits surrender for offenses other than those specified by a treaty which requires enumeration.

Article 21 of the Israeli Extradition Law of 1954 (which we assume is the statute referred to since our researches have revealed no other pertinent Israeli statute) provides:

> Where, in an agreement concerning extradition, it has been stipulated between Israel and a foreign state --
>
> (1) that only a part of the offences set out in the Schedule shall be extradition offences in respect of that state; or
>
> (2) that a detainee shall be released from detention if a request for his extradition or evidence sufficient for declaring him subject to extradition is not submitted within a period fixed in the agreement; or
>
> (3) that documents or any other material seized from the wanted person which are or is likely to serve as evidence against him in court shall be surrendered to the requesting state; or
>
> (4) that the period of validity of a declaration relating to a wanted person who has not been extradited shall be shorter than the period fixed in section 19,
>
> the stipulation shall be followed, notwithstanding the provisions of this Law or of any other Law.

It is far from self-evident that Article 21 supports the conclusion that Mr. Stein predicates upon it. It seems to relate to details of procedure under a certain type of extradition treaty. If there are decisions interpreting it to mean what Mr. Stein says, he does not mention them (and we have found no such decisions).

Perhaps Mr. Stein meant to refer to Article 1 of the 1954 Law, which provides:

> 1. A person who is in Israel shall not be extradited to another state except under this Law.

If he did mean to refer to this Article, he paraphrased it incorrectly. On its face it prohibits nothing but extradition; it does not use the broader term "surrender" (which would cover alternatives to extradition) as the Stein affidavit seems to say. Again, we are referred to no judicial decisions interpreting Article 1 to cover anything except extradition, a technical term having a well-known meaning, and presumably used by the Israeli legislature in its accepted sense. As a matter of fact, the Soblen and Lansky deportations -- both of which took place while the 1954 Act was on the books, and, if the Government's proposed interpretation of it were correct, in violation of its terms -- provide solid proof that the Government misconceives Israeli law.

For the foregoing reasons we submit that the Government has failed to demonstrate its "due diligence" and that the exception contained in Rule 5(d) of the Second Circuit Rules and the Eastern District Plan is consequently inapplicable.

III. THERE WERE NO "EXCEPTIONAL CIRCUMSTANCES" JUSTIFYING THE GOVERNMENT'S FAILURE TO BE READY FOR TRIAL WITHIN SIX MONTHS FROM THE DATE OF INDICTMENT.

Although the Government does not invoke the provisions of Rule 5(h) of the Second Circuit Rules and the Eastern District Plan, extending the six-month period for delay occasioned by "exceptional circumstances," the trial court did consider that question (A. 64 et seq.), and this Court may be constrained to do likewise. We therefore discuss it very briefly, avoiding repetition of the trial court's views which we adopt as our own.

The trial court has found that there is nothing "exceptional" about the Government's passivity in this case. This finding is amply based on the Government's failure to respond to the discovery order for disclosure of its policy and practice with respect to alternatives to extradition; the trial court's judicial notice (taken after fair notice and opportunity to show the contrary) of the discrepancy between the Government's policy and practice in Selective Service cases and its policy and practice in other cases (A. 55); and the cases and other authorities cited in Point II of this Brief revealing the Government's ready resort to alternatives to extradition. The trial court was justified in finding (A. 43-46):

> When the government's action in the Salzmann case is compared to its handling of selective service prosecutions generally, its unresponsiveness to Salzmann seems part of a pattern, rather than aberrational. * * *
>
> * * * The court knows, both from its own records and from other judicially noticeable facts, that the government does make the most strenuous efforts to procure the appearance for trial of persons charged with non-Selective Service felonies of the types mentioned, and does not hesitate to seek the return of such persons through diplomatic efforts. This is true even when an extradition treaty does not cover the offense. * * *
>
> In contrast, no serious effort has been made to locate and apprehend any of the allegedly fugitive Selective Service defendants who are on this court's docket or to procure their extradition by foreign nations. As recently as 1972, it was reported, and not denied, the government had not re-

> quested other governments to extradite or deport selective service indictees. See Note, Legal Status of American War Resisters Abroad, 5 N.Y.U.J. Int'l L. & Pol. 503, 522 (1972).
> * * *

We submit that these findings bear quite directly on the question of "exceptional circumstances." Since the Government's failure to make any effort to procure the defendant's return resulted not from any circumstance peculiar to his case, but from a general policy and practice -- followed not only here but in thousands of similar cases as well -- it cannot be considered in any way "exceptional." The simple fact is that the Government has no interest in trial and punishment of Selective Service defendants if only they leave this country and stay away for the rest of their lives. It would be grotesque if the provision for "exceptional circumstances" were applied to sanction the use of indictments as instruments of exile rather than steps toward trial.

CONCLUSION

This brief is limited to discussion of questions relevant to application of the speedy trial rules, endeavoring to focus attention on the relatively few points which we believe will prove dispositive. The trial court's opinion presents additional reasons for dismissal of the indictment under those rules, and goes on to hold that dismissal is also required by the Speedy Trial Clause of the Sixth Amendment, by Rule 48(b) of the Federal Rules of Criminal Procedure, and by 50 U.S.C. Appendix § 462. Our only reason for refraining from repetition of these additional points is that we have nothing to add to them, and see no reason to burden this Court with their reiteration here. We accept every aspect of the trial court's opinion, and adopt as our own the views there set forth.

There is no reason why this Court should accept the Government's invitation to stretch the plain provisions of the speedy trial rules in order to keep alive an indictment that has long since gone stale. There is no reason why the defendant should be required to make a long and costly trip back to this country in order to make his motion to dismiss, as the Government would seemingly have him do. The federal courts are the only arena in which the Vietnam War is still kept alive. The speedy trial rules should be allowed to play their part in laying it to rest.

The order of the district court dismissing the indictment should be affirmed.

Dated: August 25, 1976

Respectfully submitted,

LOUIS LUSKY
Attorney for defendant

SUPPLEMENTAL APPENDIX

INDEX TO SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

SIDNEY E. SALZMANN

No. 72-CR-740

MOTION FOR ORDER REQUIRING COMPLIANCE WITH DEFENDANT'S REQUEST FOR DISCOVERY AND INSPECTION, AND MOTION FOR PRODUCTION OF GRAND JURY MINUTES

The defendant having served on the Government his request for discovery and inspection (a true copy of which request is appended hereto, marked Appendix A), pursuant to Rule 16(a)(1)(c) of the Federal Rules of Criminal Procedure, and the Government having refused to comply with the said request by letter dated April 5, 1976 (a true copy of which is attached hereto, marked Appendix B), the defendant now moves for an order requiring the Government to comply with the said request on or before June 1, 1976.

And the defendant moves for an order that the grand jury minutes relating to the indictment herein be transcribed, and a copy thereof delivered to defendant's undersigned attorney.

The basis for the motions is set forth in a memorandum of law which is served and filed herewith.

Louis Lusky

Louis Lusky
Attorney for defendant
435 West 116th Street
New York, N.Y. 10027
Telephone: (212) 280-2632

NOTICE OF MOTIONS

Please take notice that the undersigned will bring the above motions on for argument before the Honorable Jack B. Weinstein in Courtroom 10, sixth floor, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on Thursday, May 6, at 9:30 a.m., or as soon thereafter as counsel can be heard.

Louis Lusky

Louis Lusky
Attorney for defendant

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA)
)
v.) No. 72-CR-740
)
SIDNEY E. SALZMANN)

DEFENDANT'S REQUEST FOR DISCOVERY AND INSPECTION

To the Attorney for the United States Government:

Pursuant to Rule 16(a)(1)(c) of the Federal Rules of Criminal Procedure, as amended effective December 1, 1975, you are hereby requested to produce for inspection by the attorney for the defendant, by May 3, 1976, the documents described in numbered paragraphs 1 through 5 hereof, or true copies thereof.

As used herein, the word "Government" includes all executive departments, agencies, bureaus, officials, employees, and any other individuals or organizations (whether or not incorporated) acting under the authority of the United States which are, or at any time since March 3, 1970 (the date of the first of the defendant's alleged offenses) have been, under the direct or indirect control of, or vested with authority granted by, any such executive department, agency, bureau, official, employee, individual, or organization.

As used herein, the word "documents" includes orders, rulings, directives, letters, communications other than letters, memoranda (including memoranda of telephone conversations and other conversations), mechanical recordings by tape or otherwise, computer memories, and any other records or devices containing information.

1. All documents within the possession or control of the United States Government, including but not limited to Federal Bureau of Investigation Form 302, relating to efforts by the said Government since June 26, 1972 (the filing date of the indictment herein) to procure the presence of the defendant for arraignment and trial, including but not limited to communications between the said Government and any foreign government.

2. All documents within the possession or control of the Government, including but not limited to communications between the said Government and any foreign government or governments, relating to efforts by the United States Government at any time after March 3, 1970, to procure the presence in this country, for arraignment or trial or sentence or completion of sentence, of persons suspected, accused, or convicted of violating the Selective Service Act and/or regulations thereunder, who were believed or known by said Government to be outside the United States.

3. All documents within the possession or control of the Government (including, without limitation, directives issued to United States Attorneys, materials included in departmental manuals, documents of the Office of Legal Counsel of the State Department and other offices of said Department, and communications to or from the same) which state, either formally or informally, the policy and/or practice of the said Government at any time since March 3, 1970, with respect to:

(a) procurement of the presence for arraignment and/or trial of persons accused of violating the Selective Service Act and/or regulations thereunder, and known or believed by said Government to be outside the United States; and/or

(b) the expenditure of the time and/or money of said Government for that purpose; and/or

(c) any priorities established regarding procurement for arraignment or trial of persons described in subparagraph (a), in comparison with the procurement for arraignment and/or trial of persons accused of other felonious violations of the laws of the United States.

4. All documents within the possession or control of the United States Government from which can be compiled a list of the names of all persons suspected, accused, or convicted of felonious violation of the laws of the United States, other than violations of the Selective Service Act and/or regulations thereunder, with respect to whom the Government has, at any time since March 3, 1970, made any effort (including, but not limited to, communications between the said Government and one or more foreign governments) to bring about their return to the United States from outside its territory, or to cause their departure or exclusion from the territory of a foreign government, otherwise than by extradition pursuant to treaty.

5. All documents within the possession or control of the Government, from which can be determined what particular executive departments, agencies, bureaus, officials, employees, individuals, or organizations of the said Government possess, or since March 3, 1970, have exercised, the authority to determine what efforts, if any, the said Government should make to procure the return to the United States of persons outside its territory, for arraignment, trial, sentence, or completion of sentence for felonious violation of the laws of the United States.

* * * * *

It will be a sufficient response to Paragraphs 2 and 4 hereof if the United States Government informs the defendant, in writing, with respect to each of the persons described in those paragraphs, (1) his or her name, (2) the statute which such person was suspected, accused, or convicted of violating, (3) the place where such person was known or believed to be located,

(4) the nature of the efforts made by the Government to procure the return of such person to the United States and/or to procure the departure or exclusion of such person from the territory of a foreign government, whether by deportation, exclusion, expulsion, diplomatic representation, or other described means whether formal or informal, and (5) the results, if any, of such efforts, including particularly the place and date of such person's subsequent trial, sentence, and/or completion of sentence, if any.

* * * * *

You are advised that defendant reserves the right to propound additional requests for discovery and inspection at a later date, relating to such additional matters as the responses to the above requests indicate are useful for the preparation of his defense, and such additional matters as the Court may deem material.

You are reminded that, as provided by Rule 16(c) of the Federal Rules of Criminal Procedure, you are and will be obligated to disclose to the defendant, without delay, or to the Court, any additional documents requested herein which may hereafter from time to time come to the attention of the Government.

Louis Lusky

Louis Lusky
435 West 116th Street
New York, N.Y. 10027
Telephone: (212) 280-2632
Attorney for defendant

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Defendant's Request for Discovery and Inspection upon the United States this 20th day of March, 1976, by mailing two copies thereof, first class postage prepaid, addressed to The Honorable David G. Trager, United States Attorney, Eastern District of New York, Federal Building, 225 Cadman Plaza East, Brooklyn, New York, 11201.

Louis Lusky

Louis Lusky
Attorney for defendant

APPENDIX B

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

CIS:TRM:ams
677833
711695

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N.Y. 11201

April 5, 1976

Professor Louis Lusky
Columbia University in the City
of New York
435 West 116th Street
New York, New York 10027

Re: U.S. v. Sidney E. Salzmann
72 CR 740

Dear Professor Lusky:

In light of all the circumstances of the above matter and the limitations imposed by Rule 16 (a)(2) and 16 (a)(1)(C) of the Rules of Criminal Procedure cooperation with your request for discovery of March 20, 1976 does not appear to be warranted.

Very truly yours,

DAVID G. TRAGER
United States Attorney

Thomas R. Maher

By Thomas R. Maher
Assistant U. S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motions and notice have been served on the United States Attorney, Eastern District of New York (Attention Thomas R. Maher, Esq.) by mailing a copy thereof, first class postage prepaid, addressed to him at Federal Building, 225 Cadman Plaza East, Brooklyn, New York, 11201, this 23rd day of April, 1976.

Louis Lusky

Louis Lusky
Attorney for defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

SIDNEY E. SALZMANN

No. 72-CR-740

MEMORANDUM IN SUPPORT OF MOTIONS FOR DISCOVERY AND INSPECTION, AND FOR GRAND JURY MINUTES

A. Motion for discovery and inspection.

The defendant's Request pursuant to Rule 16(a)(1)(c) of the Federal Rules of Criminal Procedure was served by mail on March 20, 1976. By letter dated April 5, 1976, the Government refused to comply with the Request, stating no reason for noncompliance except "the limitations imposed by Rule 16(a)(2) and 16(a)(1)(c) of the Rules of Criminal Procedure."

Rule 16(a)(2) provides no basis for noncompliance. It exempts from discovery and inspection "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case * * *." None of the requested documents has been prepared in connection with the investigation of this case except perhaps for some of those referred to in numbered Paragraph 1 of the Request. As to any such documents, the only appropriate procedure is a Government motion for a protective order under Rule 16(d)(1), not a wholesale refusal of compliance. (As a matter of fact, there is serious reason to doubt that the Government possesses any documents whatever of the type referred to in Paragraph 1 of the Request.) And, in any event, Rule 16(a)(1) provides no basis for noncompliance with Paragraphs 2, 3, 4, and 5 of the Request.

The Government's reliance on Rule 16(a)(1)(c) can only be based on a contention that the documents requested on defendant's behalf are not "material to the preparation of his defense." Any such contention is frivolous. From the very beginning, defendant has urged as a defense the failure of the Government to comply with the speedy trial requirement of the Sixth Amendment. See original Motion to Dismiss, with supporting memorandum of law, served and filed September 20, 1974, passim; Reply Memorandum served and filed November 14, 1974, passim; renewed Motion to Dismiss, with supporting memorandum of law, served and filed July 31, 1975 (and argued September 19, 1975), pages 16-18; and Supplemental Memorandum in Support of Motion to Dismiss Indictment, served and filed December 9, 1975, page 17. At each stage of the case, the defendant has pressed his speedy trial point.

Moreover, the Court itself has clearly revealed its belief that the speedy trial point is a substantial one. In Part III of its Memorandum and Order dated November 26, 1974, denying without prejudice the original Motion to Dismiss, the Court reviewed various factors pro and con, and concluded:

> In light of all the relevant considerations thus far brought to the court's attention, it cannot be said that a blanket motion to dismiss all these cases [i.e., the instant case and 25 others] on the ground of denial of a speedy trial can be granted. Facts to be developed in the individual cases will be considered with those already brought to the court's attention by defense counsel should motions be renewed in the individual cases.

Subsequently, after examination of the defendant's Selective Service file, the Motion to Dismiss on speedy trial and other grounds was renewed. At the argument of the motion on September 19, 1975, the Court reserved decision pending submission of additional briefs, which were submitted December 9, 1975. Thereupon, by Memorandum and Order dated January 6, 1976, the Court referred to additional speedy trial questions not previously briefed, and invited further

briefs on the speedy trial point, if the parties desired to file them. Counsel for the defendant notified the Court of his desire to file such a brief (by letter dated January 14, 1976) but stated his intention to pursue discovery and inspection procedures under Rule 16, as amended, before doing so. The Request referred to above was served shortly thereafter, and is now pending.

It is thus clear that, regardless of the ultimate disposition of the defendant's speedy trial point, it is a substantial one. We submit that this is enough to satisfy the requirement of Rule 16(a)(1)(c) that the required documents be "material to the preparation of his [the defendant's] defense".

It is pertiment to add that the 1974 amendment to Rule 16, effective December 1, 1975, imposes on the Government the obligation either to comply with the defendant's Request or to state an adequate reason for noncompliance. In its report on the 1974 amendment, published at pages 364 et seq. of 18 U.S.C.A., F.R.Cr.P. Rules 10 to 17.1, the Advisory Committee on Rules said (id. at 365):

> The language of the rule is recast from "the court may order" or "the court shall order" to "the government shall permit" or "the defendant shall permit." This is to make clear that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is a dispute as to whether the matter is discoverable or a request for a protective order under subdivision (d)(1). The court, however, has the inherent right to enter an order under this rule.
>
> The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases. For example, subdivision (a)(3) is not intended to deny a judge's discretion to order disclosure of grand jury minutes where circumstances make it appropriate to do so.

It would seem that the Government has not respected the intention of the amendment to Rule 16.

B. Motion for grand jury minutes.

As noted in the quotation immediately above, Rule 16 does not affect the Court's inherent power to order production of the grand jury minutes in a proper case. As noted in Point II of our Memorandum in Support of the [renewed] Motions to Dismiss Indictments [in the instant case and two others], served and filed July 31, 1975, and particularly at page 14 thereof, examination of the grand jury minutes is necessary in order to determine the highly pertinent question whether the grand jury was informed of evidence tending strongly to negate the existence of criminal intent on defendant's part. The recent decision of the Second Circuit Court of Appeals in Corniel-Rodriguez v. Immigration and Naturalization Service (decided March 22, 1976; No. 765, September Term, 1975, not yet reported) provides significant collateral support to the pre-existing authorities on this point, such as United States v. Daneals, 370 F. Supp. 1289 (W.D.N.Y. 1974).

The motion for a transcript of the grand jury minutes relating to the indictment in the instant case should be granted.

Respectfully submitted,

Louis Lusky

Louis Lusky
Attorney for defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing memorandum has been served on the United States Attorney, Eastern District of New York (Attention Thomas R. Maher, Esq.) by mailing a copy thereof, first class postage prepaid, addressed to him at Federal Building, 225 Cadman Plaza East, Brooklyn, New York, 11201, this 23rd day of April, 1976.

Louis Lusky

Louis Lusky
Attorney for defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

SIDNEY E. SALZMANN

ORDER

No. 72-CR-740

The defendant having served on the Government his request for discovery and inspection pursuant to Rule 16(a)(1)(c) of the Federal Rules of Criminal Procedure, and the Government having refused to comply therewith, and the defendant having thereupon moved for an order requiring compliance with said request; and

The defendant having further moved for an order that the grand jury minutes relating to the indictment herein be transcribed and that a copy thereof be delivered to defendant's attorney,

And oral argument having been heard, and the Court being sufficiently advised,

Now therefore it is ORDERED:

1. On or before June 10, 1976, the attorney for the Government shall deliver to the Court and to defendant's attorney copies of all documents within the possession or control of the United States which state, either formally or informally, the policy and/or practice of the said Government at any time since March 3, 1970, with respect to:

(a) procurement of the presence for arraignment and/or trial of persons accused of violating the Selective Service Act and/or regulations thereunder, and known or believed by said Government to be outside the United States; and/or

(b) the expenditure of the time and/or money of said Government for that purpose; and/or

(c) any priorities established regarding procurement for arraignment or trial of persons described in subparagraph (a), in comparison with the procurement for arraignment and/or trial of persons accused of other felonious violations of the laws of the United States.

2. On or before June 10 , 1976, the attorney for the Government shall inform the Court and defendant's attorney, in writing, whether the United States has, at any time since March 3, 1970, endeavored to precure the return to this country, from Israel and/or other countries, of indicted or convicted defendants, without resort to extradition treaties; and as to each such defendant, if any, the attorney for the Government shall inform the Court and defendant's attorney, in writing,

(a) the name of such defendant;

(b) the statute or statutes under which he was indicted or convicted;

(c) the venue and docket number of his case; and

(d) whether the attempt to procure his return to the United States was successful.

3. The parties are advised that, unless the attorney for the Government shows cause to the contrary on or before June 10 , 1976, the Court will judicially notice the following facts:

(a) that neither the United States nor the State of Israel characterizes violations of military conscription laws as political crimes; and

(b) that the United States follows the policy and practice of endeavoring to procure the return to this country of some indicted defendants without resort to extradition treaties, but does not endeavor to procure the return to this country of defendants indicted for violation of the Selective Service laws or regulations thereunder.

4. The attorney for the Government is not required to provide the Court or defendant's attorney with reports, memoranda, or other internal government documents made by the attorney for the Government or other Government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses.

5. At the present time the plaintiff's motion for discovery and inspection is granted to the extent hereinabove provided, and no further. The Court retains jurisdiction of the motion for the purpose of granting further relief, however, if such relief is determined to be appropriate in the light of the documents and information provided by the attorney for the Government in compliance with this order.

6. The plaintiff's motion for a transcript of the grand jury minutes is denied without prejudice to its renewal if the Government contends that evidence was introduced before the grand jury, as the basis for the present indictment, other than evidence as to the

defendant's draft registration, alleged orders requiring him to report for physical examination and induction, and his alleged failure so to report.

DATED: May 19, 1976

/s/ Jack B. Weinstein

Jack B. Weinstein, U.S.D.J., E.D.N.Y.

Tendered by:

Louis Lusky
Attorney for Defendant
435 West 116th Street
New York, NY 10027
Telephone: (212) 280-2632

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

F. #711695

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

June 10, 1976

Honorable Jack B. Weinstein
United States District Judge
Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Salzman
72 CR 740

Dear Judge Weinstein:

We believe that much, if not all of the documentary materials requested by the defendant, and granted in the discovery order signed by Your Honor, are not material to the preparation of any valid defense to the indictment. We believe that where, as here, the defendant was aware of the pending indictment, his decision to avoid trial constitutes a waiver of his right to a speedy trial. Similarly, for reasons which were expressed in our letter of January 16, 1976, and the earlier opinion of the district court in United States v. Lockwood, 386 F. Supp 734, (E.D.N.Y. 1975), petition for a writ of mandamus granted on other grounds, sub nom. United States v. Weinstein, 511 F.2d 622, 628 (C.A. 2), certiorari denied, sub nom. Austin v. United States, 422 U.S. 1042 (1975), a fugitive, like the defendant, is in no position to assert an alleged violation of the Speedy Trial Rules.

Rather than provoke unnecessary appellate litigation, however, we are prepared to provide certain information which is at least directly relevant to the defendant's situation, i.e., that of a fugitive residing in Israel. Accordingly, we enclose an affidavit of Murray R. Stein, a Justice Department Attorney, with special expertise in this area, detailing the policy of the Department of Justice with respect to fugitives in Israel, as well as excerpts from what is a public record, i.e., the United States Attorneys' Manual, which I am advised is the formal statement of policy of the Department of Justice regarding extradition proceedings.

I have made inquiries of the Federal Bureau of Investigation and the Department of Justice regarding the existence of other material described in Paragraph "1" of the Discovery Order and have been told that such documents do not exist.

I should add, here, that we do not believe it is at all relevant what policies are followed with respect to selective service fugitives in countries other than Israel, with whom we may have different treaty arrangements, or with respect to fugitives who have committed serious violations of other laws. The basis for the distinction between selective service fugitives and others, was aptly outlined by Your Honor in United States v. Lockwood, supra, 386 F. Supp. 737:

> " *** As recently as 1972, it was reported, and not denied, that the government did not request other governments to extradite or deport selective service indictees. See Gosfield, American War Resisters, 5 N.Y.U.J. Int'l L. & Pol. 503, 522 (1972)."
>
> * * *
>
> "Moreover, the political climate existing at the time must be considered in judging the reasonableness of the government's efforts. We take judicial notice of the fact that the governments and populace of the countries in which many draft fugitives sought asylum had expressed antipathy toward this country's participation in the Vietnam war. See, e.g., N.Y. Times, Nov. 3, 1974, § 6 (Magazine), 51, 66. American public opinion was also divided. Pressing strenuously for extradition might have seriously exacerbated feelings of hostility both at home and abroad. Given the serious doubt about whether any extradition treaty applied to what these other countries may have considered political rather than criminal offenses, the decision not to seek extradition in all cases does not appear unreasonable. See generally 2 A Treatise on International Criminal Law 309-355 (M.C. Basiouni & V. Nanda eds. 1973)(military and political offenses generally not extraditable);

Honorable Jack B. Weinstein June 10, 1976

Tate, Draft Evasion and the Problem of Extradition, 52 Albany L.Rev. 337, 355-57 (1968) (political offenses not extradictable). These factors, while not directly relevant to those normally associated with delays in the administration of justice -- e.g., absence of witnesses and calendar congestion -- do have a bearing on the bona fides of the government's action."

Accordingly, we most respectfully decline to respond to requests for "discovery" not involving selective service fugitives in other countries or to violators of other laws who are fugitives in other countries. Moreover, so that the record is clear, we do not believe that paragraph "2" of the discovery order is a request for either documentary or tangible items, and is, therefore, not authorized by Rule 16(a)(1)(c).

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

By: Thomas R. Maher.
THOMAS R. MAHER
Assistant United States Attorney

Encs.

cc: Professor Louis Lusky
Columbia University School
of Law
435 West 116th Street
New York, N.Y. 10027